UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-60476-CIV-DIMITROULEAS
Magistrate Judge Rosenbaum

MARLENE WHITTIER, as Personal Representative for the Estate of ANTHONY DIOTAIUTO, deceased and individually,

Plaintiff,

vs.

CITY OF SUNRISE, a Municipality of the State of Florida, ANDRE BRUNA, individually, SEAN VISNERS, individually, DAVID BOYETT, individually, DANIEL KOBAYASHI, individually, ERIC GOLDSTEIN, individually, and ERIK PALACIO, individually,

Defendants.

ORDER DENYING DEFENDANTS ERIC GOLDSTEIN AND ERIK PALACIO'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court upon Defendants, Eric Goldstein and Erik Palacio's Motion for Summary Judgment [DE 139]. The Court has carefully considered the Motion, Defendants' Statement of Undisputed Material Facts [DE 140], Plaintiffs Response [DE 157], Plaintiffs Omnibus Statement of Material Facts and Controverted Facts [DE 153], Defendant's Reply [DE 171] the parties attached exhibits and depositions and is otherwise fully advised in the premises.

I. BACKGROUND

On April 11, 2007 the Plaintiff Marlene Whittier ("Plaintiff"), as Personal representative of her son Anthony Diotaiuto ("Diotaiuto"), and individually, filed a seven count Amended Complaint against Defendant Officers Eric Goldstein ("Goldstein"), Erik Palacio ("Palacio"), the City of Sunrise ("City"), Officer Sean Visners ("Visners"), Chief David Boyett[1] Officer Andre Bruna ("Bruna") and Officer Daniel Kobayashi ("Kobayashi") [DE 9]. Plaintiffs son was shot to death by a police SWAT unit executing a search warrant in the early morning of August 5, 2005.

Early in the morning on August 5, 2005, the SWAT team was briefed, and received an operational plan, before executing a search warrant. The target of the search warrant was the Whittier/Diotaiuto home, located at 8500 N.W. 24th Court, Sunrise, Florida. The operational plan utilized an eight (8) man SWAT team to execute the warrant, called for the team leader to knock and announce prior to entry and called for the deployment of a flash-bang distraction device[2] before entry. Kobayashi was the SWAT supervisor and team leader. The SWAT team was dressed in full SWAT gear with the word "police" written on their uniforms. All members of the

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[1] On August 20, 2007 the Court granted Defendant David Boyett's Motion to Dismiss [DE 54].

[2] A flash-bang distractionary device is a "light/sound diversionary device designed to emit a brilliant light and loud noise upon detonation. Its purpose is to stun, disorient, and temporarily blind its targets, creating a window of time in which police officers can safely enter and secure a potentially dangerous area." Boyd v. Benton County, 374 F.3d 773, 776 (9th Cir. 2004).

SWAT team had attended extensive training and had been instructed that flash-bang devices should not be thrown directly at individuals. Palacio and Goldstein made up the breach team and were responsible for forcibly opening the residence door if necessary. Officer Bruna was responsible for deploying the flash-bang device.

According to police allegations, Diotaiuto was a known drug dealer. Investigations into Diotaiuto's drug activity lead to the eventual issuance of a search warrant. Intelligence also revealed that Diotaiuto had a concealed weapons permit and carried a handgun on him at all times. Additional intelligence advised that he kept a loaded shot-gun in the master bedroom closet of his home. Based on this information, the warrant service was labeled "high risk" which the City defines as "involving acts of violence or potential acts of violence." The City utilizes a SWAT team in the service of all "high risk" warrants.

Just after 6:00 in the morning on August 5, 2005 the SWAT team approached the door of the Whittier/Diotaiuto household. According to the testimony of the officers, Kobayashi approached the door, knocked loudly several times and announced the presence of the Sunrise Police and the search warrant. Fourteen (14) police officers present at the scene testified that they heard Kobayashi knock and announce.[3] Only a single officer, Officer Bettencourt, did not

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[3] Defendant Officer Erik Palacio, Defendant Officer Eric Goldstein, Defendant Officer Sean Visners, Defendant Officer Andre Burna, Defendant Sergeant Daniel Kobayashi, Officer Kevin McDonnell, Lieutenant Charles Vitale, Officer John Jaslowski, Detective Luis Castro, Detective Michael Calise, Detective Barry Schwartz, Officer Machelle Quinones, Officer Antoine

hear the knock and announce. Despite the fact that nearly every officer present heard a loud and forceful, knock and announce, not a single neighbor heard a knock or an announcement of the police presence. At least three neighbors, Noreen Dows,[4] Rudy Strauss[5] and Nicholas

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Bennet and Officer Brooke Lebel all testified that they heard Kobayashi knock and announce.

[4] Noreen Dows lives behind and diagonal to the Whittier/Diotaiuto household. Their back yards are kitty-corner to one another. Mrs. Dows woke up at approximately 5:15 am, and was having coffee on her back porch when she heard a loud sound like an electrical transformer blowing and saw a bright light. She then investigated and was told that the presence in the backyard was the Sunrise Police. Mrs. Dows then returned to her house where she heard a serious of popping noises. She did not hear anyone knock and announce and she testified in her deposition that she would have been able to hear an officer who loudly announced himself at the Whittier/Diotaiuto front porch. She testified that she has previously heard conversations coming from the driveway and has even heard keys drop on the driveway.

[5] Rudy Strauss lives next door to the Whittier/Diotaiuto household. Mr. Strauss and his wife were standing at their window watching the officers lined up at the Whittier/Diotaiuto household. Mr. Strauss testified in his deposition that it is his opinion that he would have been able to hear a knock and announce, if one had occurred, he did not hear one. He only heard a loud bang and saw a flash like a flash bulb on a camera. Mr. Strauss' opinion did not change after he found out that he also did not hear the battering ram break down the Whittier/Diotaiuto

Spatafora[6] testified that they were listening and would have been able to hear such an announcement if it had occurred. In response, the Defendants seek to introduce testimony by their sound expert, based on sound tests taken during a re-creation of the alleged "knock and announce," suggesting that even if these neighbors had been paying attention, they could not physically have heard the knock and announce.[7] The Plaintiff vigorously disputes the accuracy of this evidence.

Next, the breach team was signaled by Sergent Kobayashi. Officer Goldstein operated the Halligan tool, which is pushed into the door frame and struck with a battering ram until the

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front door.

[6] Nicholas Spatafora lives across the street from the Whittier/Diotaiuto household. On August 5, 2005, Mr. Spatafora was standing in his living room ironing his shirt when he heard three or four loud noise that sounded like someone was hitting his parked car with a bat. After about 15-20 seconds, Mr. Spatafora heard a series of sounds like a bunch of firecrackers going on inside the house. Mr. Spatafora testified that he heard no knock or announcement from the police and that had there been a knock and announce he would have heard it. He testified that he has heard even regular conversations coming from the Whittier/Diotaiuto driveway. The results of the expert's sound test did cause Mr. Spatafora to change his testimony.

[7] Sound tests were conducted at Noreen Dows' household and at Nicholas Spatafora's household, but not at Rudy and Jane Strauss' household. These sound tests were not taken at the same time of day, or under the same atmospheric circumstances, as the series of events at issue in this case.

door opens. Officer Palacio operated the battering ram. Palacio and Goldstein testified that it took about 10-15 second to open the door. After he pried the door open, Officer Goldstein testified that he saw Diotaiuto sitting on the couch.

After the Defendants breached the door, Officer Bruna looked into the house,[8] did not see the Defendant, and deployed a flash bang distractive device in the direction of the back bedroom. When the SWAT team entered the house, Diotaiuto was standing in his boxer shorts staring at the police officers. Kobayashi yelled "get on the ground." Instead of complying with the police orders, Diotaiuto began running to the back bedroom of the house, where he kept his weapons. Defendants Bruna and Visners chased Diotaiuto to the back bedroom, and Officer Visners kicked open the door and followed the suspect inside. Bruna and Visners testified that Diotaiuto grabbed his gun, racked it and pointed it at them. Both officers were yelling at Diotaiuto to put the gun down. Two rounds of shots were fired, and Diotaiuto was killed. The medical examiner and Plaintiffs own forensic pathology expert testified that on autopsy, the decedent showed no signs of injury from the distraction device. Instead, the decedent died from the fatal gunshot wounds fired by Officers Bruna and Visners. The instant lawsuit, brought by his mother, followed.

II. DISCUSSION

The only claim alleged against Defendants Goldstein and Palacio is under 42 U.S.C. § 1983, pursuant to the Fourth

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[8] **Despite the fact that the Plaintiff contests this fact, as discussed more fully below, she has advanced no evidence suggesting that the flash bang was thrown either blindly into the house, or intentionally at Diotaiuto.**

Amendment, in Count III of the Complaint based on a failure to knock and announce. In their Motion, Defendants Goldstein and Palacio argue that they are entitled to summary judgment because: (1) the admissible evidence in this case establishes that Defendant Kobayashi did knock and announce before entering the Plaintiffs residence or (2) *even if* Kobayashi did not knock and announce, they are still entitled to qualified immunity because it was not their responsibility or duty to knock and announce and therefore their behavior was objectively reasonable under the circumstances. The Court will address each argument in turn.

A. Summary Judgment Standard

The Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The Court should not grant summary judgment unless it is clear that a trial is unnecessary, see Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 255 (1986), and any doubts in this regard should be resolved against the moving party, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp., 477 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. Id. at 325.

After the movant has met its burden under Rule 56(c), the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). According to the plain language of Federal Rule of Civil Procedure 56(e), the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings," but instead must come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); Matsushita, 475 U.S. at 587.

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. Anderson, 477 U.S. at 257. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the non-moving party "is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. 242, 249-50 (internal citations omitted). Consideration of a motion for summary judgment, however, "does not lessen the burdens on the non-moving party: the non-moving party still bears the burden of coming forward with sufficient evidence on *each element* that must be proven." Earley v. Champion Int'l Corp., 907 F.2d 1077, 1080 (11th Cir. 1990) (emphasis in original).

B. A Material Dispute of Fact Exists as to whether Defendant Kobayashi Knocked and Announced before entering.

The common-law principle that law enforcement officers

must announce their presence and provide residents an opportunity to open the door is an ancient one. See Wilson v. Arkansas, 514 U.S. 927, 931-32 (1995). The Defendants argue that the evidence in this case conclusively proves, as a matter of law, that Defendant Kobayashi knocked and announced before entering the Whittier/Diotaiuto residence to serve the search warrant. Defendants point out that fourteen (14) different officers present on the scene testified that a knock and announce occurred. The Defendants argue that this evidence is uncontroverted. Defendants argue that the neighbors who testified that they did not hear a knock and announce are insufficient to create a genuine issue of material fact. Defendants base this argument upon the statements of various witnesses that they were either sleeping, inside, or not paying attention at the time of the alleged knock and announce. Defendants also advance expert witness evidence suggesting that none of the neighbors would have been able to hear Kobayashi's knock and announce from where they were positioned even if they were paying close attention.

In response, the Plaintiff contends that a genuine issue of material fact remains with respect to whether the knock and announce occurred because not a single neighbor or witness heard it. Plaintiff points to at least three (3) witnesses who adamantly believe that they were paying attention, in close proximity to the Whittier/Diotaiuto household at a quiet hour in the morning, and if such a knock and announce occurred, they would have heard it. The Court agrees that the Plaintiff has advanced sufficient evidence to create a triable issue of material fact.

Courts have held that the fact that witnesses who were in a position to hear something did not in fact hear it, would allow a jury reasonably to conclude that the something did not occur. See Vathekan v. Prince George's County, 154 F.3d

173, 180 (4th Cir. 1998) ("If a warning is not given, then a witness will not hear one. A juror could reasonably conclude that if certain witnesses did not hear a warning, then *no* warning was given, even if other witnesses testify to a warning."); Kopf v. Wing, 942 F.2d 265, 267-68 (4th Cir. 1991) (finding that the District Court improperly made determinations of material fact when it discounted civilian witness testimony that they heard no warning given before a police officer released his police dog.); Massasoit v. Carter, 439 F. Supp. 2d 463,478 (M.D.N.C. 2006) ("In the end, viewing all of the evidence in the light most favorable to plaintiffs, Phelps was in a place where he could have heard Tomeny yelling for him to kill or shoot Butler and he did not hear this. In instances such as this, the Court cannot simply ignore the fact that a witness did not hear something that they should have heard.").

This case is much like the case in Sledd v. Linsday, 102 F.3d 282 (7th Cir. 1996), where the Seventh Circuit found that several triable issues of material fact remained with respect to whether the Plaintiff had suffered a Fourth Amendment violation. In Sledd, the court credited the testimony of the "neighbors in the adjacent duplexes" who "also heard no 'knock and announce' prior to the officers' forced entry into the house." Id. at 286. The court eventually found that:

> [h]ere, there are jury issues on several crucial questions. First, the parties dispute whether the officers announced their presence and warned Sledd that they were police executing a warrant. The police officers have not claimed any exigent circumstances to exempt their actions from the usual 'knock and announce' rule. Sledd introduced testimony from a number of persons that no warnings were given and

> that the officers were not otherwise identifiable as members of the police department.

Id. at 288. Likewise, in this case the Plaintiff has introduced testimony that none of the neighbors home on the morning of the incident heard the police knock and announce, and that at least three (3) of these neighbors believe that they were in a position to have heard any such knock or announcement had either occurred. The Defendants may be able to discredit this testimony using their expert, or otherwise. However, this factual determination is one for the jury and not for the Court. Accordingly, the Court finds that material fact issues remain as to whether the Defendants knocked and announced their presence, as constitutionally required, before entering the Whittier/Diotaiuto household.

C. Qualified Immunity

Alternatively, Defendants argue that even if a constitutional violation occurred, and no knock and announce took place, they are nonetheless entitled to qualified immunity because they reasonably relied on orders from Defendant Kobayashi in entering the dwelling without first knocking and announcing their presence.

Qualified immunity is an entitlement not to stand trial or face the burden of litigation, rather than a mere defense to liability. Gonzales v. Reno, 325 F.3d 1228, 1233 (11th Cir. 2003). Whether a public officer is entitled to qualified immunity depends on the specific details of a case, and is a question of law for the Court. Tapley v. Collins, 211 F.3d 1210, 1215 (11th Cir. 2000). "The purpose of this immunity is to allow governmental officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly

incompetent or one who is knowingly violating the federal law." Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002)(internal citations omitted). Under the doctrine, "'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Evans v. Hightower, 117 F.3d 1318, 1320 (11th Cir. 1997) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

In addressing claims of qualified immunity, the Eleventh Circuit applies the following two-part analysis. "First the defendant government official must prove that he was acting within the scope of his discretionary authority when the alleged wrongful act occurred. If the defendant meets this burden, the plaintiff must then demonstrate that the defendant violated clearly established law based upon objective standards." Evans, 117 F.3d at 1320 (internal citations omitted).

Under the first step of the analysis, as the Court found in its Order Denying the Defendants' Motion to Dismiss [DE 52], "[u]nder this standard, Defendants Goldstein and Palacio, as a matter of law, were undoubtedly engaged in a discretionary function when they participated in serving the search warrant." at p. 4. No party disputes this.

Considering the second part of the qualified immunity analysis, the plaintiff must then demonstrate that the Defendants violated "clearly established law based on objective standards." Evans, 117 F.3d at 1320 (citing Hartsfield v. Lemacks, 50 F.3d 950, 953 (11th Cir. 1995)). "In order to meet this burden, the plaintiff must demonstrate that the contours of his right were sufficiently clear so that

reasonable officers would have understood that their actions violated his rights." Evans, 117 F.3d at 1320 (citing Swint v. City of Wadley, 51 F.3d 988, 995 (11th Cir. 1995) and Anderson v. Creighton, 483 U.S. 635, 640 (1987)). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . ., but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Anderson, 483 U.S. at 640 (internal citations omitted); see also Moniz v. City of Fort Lauderdale, 145 F.3d 1278, 1282 (11th Cir. 1998).

The analysis of whether a "clearly established law" was violated also has two steps. Holmes v. Kucynda, 321 F.3d 1069, 1077 (11th Cir. 2003). First, is the "threshold question" of whether the facts as alleged, viewed in the light most favorable to the Plaintiff, would establish a constitutional violation. Id. (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). "If no constitutional violation is established, then the defendants prevail, and 'there is no necessity for further inquiries concerning qualified immunity." Id. (quoting Saucier, 533 U.S. at 201). However, if a constitutional right would have been violated under the plaintiffs version of the facts, the Court then must determine whether that right was clearly established. Id.

In its Order Denying Defendants Motion to Dismiss, the Court held that the "state of the law in 2003, much less 2005, certainly gave the officers fair warning that an entry, without knocking and announcing, would be unconstitutional, absent some exceptions." at p. 5 (citing Green v. Butler, 420 F.3d 689, 701 (7th Cir. 2005)), and as more fully explained above, the Court finds that material fact issues remain as to whether a knock and announce occurred in this case. Accordingly, the Defendants do not argue that this right was not clearly

established, nor do they argue that exigent circumstances were present or that knocking or announcing would have proven futile. Rather, they argue that they are entitled to qualified immunity because Defendants Goldstein and Palacio were merely the breach team. They were not the team leaders nor was knocking and announcing their presence part of their responsibilities in executing the search warrant. Defendants argue that as the breach team, it was reasonable for them to rely on the decision made by their team leader to open the door, despite any absence of a knock and announcement.

Defendants cite to several[9] cases that stand for the proposition that under certain circumstances an officer may be entitled to qualified immunity when following the direct orders of a superior. See Vela v. White, 703 F.2d 147, 152 (5th Cir. 1983) ("Under the circumstances of this case, it would not be fair to force [the defendant] to either violate a direct order or else stop and interrogate [his supervisor] as to the reasons for his order, at the risk of being held liable for damages."); Brent v. Ashley, 247 F.3d 1294, 1306 (11th Cir. 2001)("Here, the record is devoid of any evidence that would support the conclusion that [the defendants] acted unreasonably [in following their superior's orders]."); Higgins v. Gee, 2008 WL 190493 (M.D. Fla. January 22, 2008) ("the Court notes that there is authority.. for the proposition that an officer who follows the direct orders of a supervisor in effecting an arrest may be entitled to qualified immunity, *under certain circumstances.")*. However, none of the cases

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[9] Despite Defendants' representation that the Eleventh Circuit "adopted" the reasoning of Vela v. White, 703 F.2d 147, 152 (5th Cir. 1983), in Jordan v. Doe, 38 F.3d 1559 (11th Cir. 1994), Vela was only cited in the dissent, and was not mentioned in the Eleventh Circuit's majority opinion.

stand for the proposition for which they are advanced. In each of these cases the courts engaged in a fact intensive inquiry as to whether it was reasonable, under the circumstances, for the officer to rely on such commands of his or her superior. In these cases, it was reasonable for the officers to rely on such commands because the individual officers were not present for all of the events leading up to the alleged constitutional violations and therefore had no reason to doubt the commands. As the Eleventh Circuit pointed out in Jordan v. Doe, 38 F.3d 1559, 1571 (11th Cir. 1994), it did not "mean to suggest that a defendant is entitled to immunity merely upon proof that he or she was acting pursuant to orders. This is not and should not be the law." Instead, the Court finds that cases cited by the Defendants establish that the inquiry turns on whether or not it was *reasonable,* under the circumstances, for the officer to rely on the commands of his or her superior.

Issues of fact remain as to whether the [sic] it was reasonable for Officers Palacio and Goldstein to rely on the orders of Kobayashi to enter the dwelling without a knock and announce. The Court agrees, however, with the Fifth Circuit in Hodge v. Laryisson, 226 F.3d 642; 2000 WL 1029029 *2 (5th Cir 2000) (unpublished opinion), that not every law enforcement officer is required to knock and announce. The Court also agrees that an officer should not be expected to question his or her supervisor's orders in a police paramilitary operation when split second decisions are made in the field, and any delay could endanger the lives of the other officers present. See Graham v. Connor, 490 U.S. 386, 396-97 (1989) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving. . ."). It would be reasonable for an officer to rely on their supervisor's split second decision that circumstances have changed and a knock-and-

announce is no longer required. Here, however, no one argues that this was the case. What is more, in this case there is a material issue of fact as to whether the police are lying concerning whether a knock and announce actually occurred. Accordingly, if the jury determines that the police officers are lying and that no knock and announce in fact occurred, they may be able to circumstantially infer that they lied about any prior knowledge of the intent of the SWAT operation to dispense with the knock and announcement altogether. If the Defendants were involved in, or privy to, any prior determination that no knock and announce was to occur in this case, despite being constitutionally required, then any reliance on orders given by Kobayashi was misplaced and any grant of qualified immunity would be inappropriate.

In this case, Defendants Goldstein and Palacio were present for all of the events leading up to the forced entry and nobody claims that there were any exigent circumstances or that a knock and announce was not required. Defendants Goldstein and Palacio were also informed of the operational plan ahead of time and were present for the briefing prior to the execution of the warrant.[10] This operational plan called for a knock and announce. No reason has been given for the change in plans, should the jury find that no knock and announce occurred. Accordingly, while it would have been reasonable under the circumstances for Defendants Goldstein and Palacio to rely on Kobayashi's command to enter without

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[10] Accordingly, this case is distinguishable from Hodge, 226 F.3d 642, because in that case there was no evidence that the "tag-along" officer was privy to any of the operational plans. Accordingly, it would have been more reasonable for this officer to rely on the representation of his supervising officer that a knock and announce could be dispensed with.

first knocking and announcing if such a determination were a split-second decision made during the execution of the warrant. Such reliance, however, would not be reasonable if the Defendants had prior knowledge of an intention to improperly dispense with the knock and announce requirement. Because the jury could infer from circumstantial evidence that the officers have fabricated their story, qualified immunity is not appropriate at this time absent further factual findings by the jury.[11] The law was clearly established at the time that entering a dwelling without first knocking and announcing, absent exigent circumstances, violates the Fourth Amendment of the Constitution. If the Defendants knowingly did not abide by this constitutional requirement they can be held liable.

In closing, the Court is cognizant that qualified immunity is an entitlement not to stand trial or face the burden of litigation, rather than a mere defense to liability, Gonzales, 325 F.3d at 1233, and therefore should be granted at the earliest possible point in the case, Id.; Parrish v. Nikolits, 86 F.3d 1088, 1094 (11th Cir. 1996). While the Court takes this responsibility seriously, because the Court finds that issues of fact remain with respect to the circumstances surrounding any failure to knock and announce, the Defendants are not entitled to qualified immunity at this time and their Motion for

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[11] At trial, the Defendants may argue alternatively that they are entitled to qualified immunity because their reliance was reasonable and request a special interrogatory verdict form at the charge conference. The Court may use these factual findings to grant qualified immunity at this point, as a mailer of law, if the jury's factual findings show that such immunity is warranted. See Priester v. City of Riviera Beach, 208 F.3d 919, 926 (11th Cir. 2000).

Summary Judgment must be denied.

III. CONCLUSION

Accordingly, for the foregoing reasons and because the Court finds that issues of fact remain as to whether a knock and announce actually occurred in this case, it is **ORDERED AND ADJUDGED** that Eric Goldestein [sic] and Erik Palacio's Motion for Summary Judgment [DE 139] is hereby **DENIED.**

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 12th day of May, 2008.

/s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of record

APPENDIX F

F-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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Magistrate Judge Rosenbaum

MARLENE WHITTIER, as Personal Representative for the Estate of ANTHONY DIOTAIUTO, deceased and individually,

Plaintiff,

vs.

CITY OF SUNRISE, a Municipality of the State of Florida, ANDRE BRUNA, individually, SEAN VISNERS, individually, DAVID BOYETT, individually, DANIEL KOBAYASHI, individually, ERIC GOLDSTEIN, individually, and ERIK PALACIO, individually,

Defendants.

ORDER GRANTING, IN PART, AND DENYING, IN PART, DEFENDANT DANIEL KOBAYASHI'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court upon Defendant Sergeant Daniel Kobayashi's Motion for Summary Judgment [DE 134]. The Court has carefully considered the Motion, Plaintiffs Memorandum in Opposition RE 156], Defendant's Reply [DE 172], Defendant City of Sunrise and Daniel Kobayashi's Concise Statement of Material Facts [DE 135], Plaintiffs Omnibus Statement of Material and Controverted Facts [DE 153] the parties attached exhibits and depositions and is otherwise fully advised in the premises.

I. BACKGROUND

On April 11, 2007 the Plaintiff Marlene Whittier *("Plaintiff")*, as Personal representative of her son Anthony Diotaiuto ("Diotaiuto"), and individually, filed a seven count Amended Complaint against Defendant Officers Eric Goldstein ("Goldstein"), Erik Palacio ("Palacio"), the City of Sunrise ("City"), Officer Sean Visners ("Visners"), Chief David Boyett[1] Officer Andre Bruna ("Bruna") and Officer Daniel Kobayashi ("Kobayashi") [DE 9]. Plaintiffs son was shot to death by a police SWAT unit executing a search warrant in the early morning of August 5, 2005.

Early in the morning on August 5, 2005, the SWAT team was briefed, and received an operational plan, before executing a search warrant. The target of the search warrant was the Whittier/Diotaiuto home, located at 8500 N.W. 24th Court, Sunrise, Florida. The operational plan utilized an eight (8) man SWAT team to execute the warrant, called for the team leader to knock and announce prior to entry and called for the deployment of a flash-bang distraction device[2] before entry. Kobayashi was the SWAT supervisor and team leader. The SWAT team was dressed in full SWAT gear with the word "police" written on their uniforms. All members of the

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[1] On August 20, 2007 the Court granted Defendant David Boyett's Motion to Dismiss [DE 54].

[2] A flash-bang distractionary device is a "light/sound diversionary device designed to emit a brilliant light and loud noise upon detonation. Its purpose is to stun, disorient, and temporarily blind its targets, creating a window of time in which police officers can safely enter and secure a potentially dangerous area." Boyd v. Benton County, 374 F.3d 773, 776 (9th Cir. 2004).

SWAT team had attended extensive training and had been instructed that flash-bang devices should not be thrown directly at individuals. Palacio and Goldstein made up the breach team and were responsible for forcibly opening the residence door if necessary. Officer Bruna was responsible for deploying the flash-bang device.

According to police allegations, Diotaiuto was a known drug dealer. Investigations into Diotaiuto's drug activity lead to the eventual issuance of a search warrant. Intelligence also revealed that Diotaiuto had a concealed weapons permit and carried a handgun on him at all times. Additional intelligence advised that he kept a loaded shot-gun in the master bedroom closet of his home. Based on this information, the warrant service was labeled "high risk" which the City defines as "involving acts of violence or potential acts of violence." The City utilizes a SWAT team in the service of all "high risk" warrants.

Just after 6:00 in the morning on August 5, 2005 the SWAT team approached the door of the Whittier/Diotaiuto household. According to the testimony of the officers, Kobayashi approached the door, knocked loudly several times and announced the presence of the Sunrise Police and the search warrant. Fourteen (14) police officers present at the scene testified that they heard Kobayashi knock and announce.[3] Only a single officer, Officer Bettencourt, did not

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[3] Defendant Officer Erik Palacio, Defendant Officer Eric Goldstein, Defendant Officer Sean Visners, Defendant Officer Andre Burna, Defendant Sergeant Daniel Kobayashi, Officer Kevin McDonnell, Lieutenant Charles vitale, Officer John Jaslowski, Detective Luis Castro, Detective Michael Calise, Detective Barry Schwartz, Officer Machelle Quinones, Officer Antoine

hear the knock and announce. Despite the fact that nearly every officer present heard a loud and forceful, knock and announce, not a single neighbor heard a knock or an announcement of the police presence.[4] At least three neighbors, Noreen Dows,[5]

Bennet and Officer Brooke Lebel all testified that they heard Kobayashi knock and announce.

[4] Defendant argues that the Plaintiffs witnesses fail the "personal knowledge" requirement of Rule 602 of the Federal Rules of Evidence. The Court agrees with the Plaintiff that their witnesses easily meet the personal knowledge requirement in testifying to events not perceived through one of the five senses. See Los Angeles Times Commc'ns, LLC v. Dept. of the Army, 442 F. Supp. 2d 880, 886 (CD. Cal. 2006). As more fully discussed below, the Plaintiff points to other cases where courts have permitted testimony by lay witnesses as to what they *did not* perceive. See e.g. Massasoit v. Carter, 439 F. Supp. 2d 463, 477 (M.D.N.C. 2006); Vathekan v. Prince George's County, 154 F.3d 173, 175-76 (4th Cir. 1998); Kopf v. Wing, 942 F.2d 265, 266 (4th Cir. 1991).

[5] Noreen Dows lives behind and diagonal to the Whittier/Diotaiuto household. Their back yards are kitty-corner to one another. Mrs. Dows woke up at approximately 5:15 a.m. and was having coffee on her back porch when she heard a loud sound like an electrical transformer blowing and saw a bright light. She then investigated and was told that the presence in the backyard was the Sunrise Police. Mrs. Dows then returned to her house where she heard a serious of popping noises. She did not hear anyone knock and announce and she testified in her deposition that she would have been able to hear an officer who loudly

Rudy Strauss[6] and Nicholas Spatafora[7] testified that they were listening and would have been able to hear such an announcement if it had occurred. In response, the Defendants seek to introduce testimony by their sound expert, based on

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announced himself at the Whittier/Diotaiuto front porch. She testified that she has previously heard conversations coming from the driveway and has even heard keys drop on the driveway.

[6] Rudy Strauss lives next door to the Whittier/Diotaiuto household. Mr. Strauss and his wife were standing at their window watching the officers lined up at the Whittier/Diotaiuto household. Mr. Strauss testified in his deposition that it is his opinion that he would have been able to hear a knock and announce, if one had occurred, he did not hear one. He only heard a loud bang and saw a flash like a flash bulb on a camera. Mr. Strauss' opinion did not change after he found out that he also did not hear the battering ram break down the Whittier/Diotaiuto front door.

[7] Nicholas Spatafora lives across the street from the Whittier/Diotaiuto household. On August 5, 2005, Mr. Spatafora was standing in his living room ironing his shirt when he heard three or four loud noise that sounded like someone was hitting his parked car with a bat. After about 15-20 seconds, Mr. Spatafora heard a series of sounds like a bunch of firecrackers going on inside the house. Mr. Spatafora testified that he heard no knock or announcement from the police and that had there been a knock and announce he would have heard it. He testified that he has heard even regular conversations coming from the Whittier/Diotaiuto driveway. The results of the expert's sound test did cause Mr. Spatafora to change his testimony.

sound tests taken during a re-creation of the alleged "knock and announce," suggesting that even if these neighbors had been paying attention, they could not physically have heard the knock and announce.[8] The Plaintiff vigorously disputes the accuracy of this evidence.

Next, the breach team was signaled by Sergent Kobayashi. Officer Goldstein operated the Halligan tool, which is pushed into the door frame and struck with a battering ram until the door opens. Officer Palacio operated the battering ram. Palacio and Goldstein testified that it took about 10-15 second to open the door. After he pried the door open, Officer Goldstein testified that he saw Diotaiuto sitting on the couch.

After the Defendants breached the door, Officer Bruna looked into the house,[9] did not see the Defendant, and deployed a flash bang distractive device in the direction of the back bedroom. When the SWAT team entered the house, Diotaiuto was standing in his boxer shorts staring at the police officers. Kobayashi yelled "get on the ground." Instead of complying with the police orders, Diotaiuto began running to the back bedroom of the house, where he kept his weapons. Defendants Bruna and Visners chased Diotaiuto to the back

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[8] Sound tests were conducted at Noreen flows' household and at Nicholas Spatafora's household, but not at Rudy and Jane Strauss' household. These sound tests were not taken at the same time of day, or under the same atmospheric circumstances, as the series of events at issue in this case.

[9] Despite the fact that the Plaintiff contests this fact, as discussed more fully below, she has advanced no evidence suggesting that the flash bang was thrown either blindly into the house, or intentionally at Diotaiuto.

bedroom, and Officer Visners kicked open the door and followed the suspect inside. Bruna and Visners testified that Diotaiuto grabbed his gun, racked it and pointed it at them. Both officers were yelling at Diotaiuto to put the gun down. Two rounds of shots were fired, and Diotaiuto was killed. The medical examiner and Plaintiffs own forensic pathology expert testified that on autopsy, the decedent showed no signs of injury from the distraction device. Instead, the decedent died from the fatal gunshot wounds fired by Officers Bruna and Visners. The instant lawsuit, brought by his mother, followed.

II. DISCUSSION

In Count II of the Complaint the Plaintiff alleges that Defendant Kobayashi violated Diotaiuto' s civil rights by entering his home without knocking and announcing the presence of police officers and by permitting or directing a flash-bang distractive device to be thrown either blindly or directly at Diotaiuto. In his Motion, Kobayashi argues that he is entitled to summary judgment because: (1) the admissible evidence in this case establishes that Defendant Kobayashi did knock and announce before entering the Plaintiffs residence; (2) the record is devoid of any evidence that Officer Bruna deployed the flash-bang device blindly or directly at Diotaiuto; (3) the record is devoid of any evidence showing that Kobayashi in any way authorized the blind deployment of a distraction device, or the deployment of such a device blindly or directly at Diotaiuto; (4) even if the flash-bang were deployed blindly or directly at Diotaiuto this is insufficient, as a matter of law, to establish a Fourth Amendment violation, or at the very least Kobayashi is entitled to qualified immunity because such a right was not clearly established at the time; and finally (4) since the shooting/deadly force is conceptually distinct from any prior

alleged violation, Kobayashi cannot be held liable for it. The Court will address each argument in turn.

A. Summary Judgment Standard

The Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The Court should not grant summary judgment unless it is clear that a trial is unnecessary, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), and any doubts in this regard should be resolved against the moving party, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp., 477 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. Id. at 325.

After the movant has met its burden under Rule 56(c), the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the

material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). According to the plain language of Federal Rule of Civil Procedure 56(e), the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings," but instead must come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); Matsushita, 475 U.S. at 587.

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. Anderson, 477 U.S. at 257. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the non-moving party "is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. 242, 249-50 (internal citations omitted). Consideration of a motion for summary judgment, however, "does not lessen the burdens on the non-moving party:

> the non-moving party still bears the burden of coming forward with sufficient evidence on *each element* that must be proven." Earley v. Champion Int'l Corp., 907 F.2d 1077, 1080 (11th Cir. 1990) (emphasis in original).

B. A Material Dispute of Fact Exists as to whether Defendant Kobayashi Knocked and Announced before entering.

The common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one. See Wilson v. Arkansas, 514 U.S. 927, 931-32 (1995). The Defendant argues that the evidence in this case conclusively proves, as a matter of law, that Kobayashi knocked and announced before entering the Whittier/Diotaiuto residence to serve the search warrant. Defendant points out that fourteen (14) different officers present on the scene testified that a knock and announce occurred. The Defendant contends that this evidence is uncontroverted. Defendant further argues that the neighbors who testified that they did not hear a knock and announce are insufficient to create a genuine issue of material fact. Defendant bases this argument upon the statements of various witnesses that they were either sleeping, inside, or not paying attention at the time of the alleged knock and announce. Defendant also advances expert witness evidence suggesting that none of the neighbors would have been able to hear the knock and announce from where they were positioned even if they were paying close attention.

In response, the Plaintiff contends that a genuine issue of material fact remains with respect to whether the knock and announce occurred because not a single neighbor or witness heard it. Plaintiff points to at least three (3) witnesses who adamantly believe that they were paying attention, in close

proximity to the Whittier/Diotaiuto household at a quiet hour of the morning, and if such a knock and announce occurred, they would have heard it. The Court agrees that the Plaintiff has advanced sufficient evidence to create a triable issue of material fact.

Courts have held that the fact that witnesses who were in a position to hear something did not in fact hear it, would allow a jury reasonably to conclude that the something did not occur. See Vathekan v. Prince George's County, 154 F.3d 173, 180 (4th Cir. 1998) ("If a warning is not given, then a witness will not hear one. A juror could reasonably conclude that if certain witnesses did not hear a warning, then *no* warning was given, even if other witnesses testify to a warning."); Kopf v. Wing, 942 F.2d 265, 267-68 (4th Cir. 1991) (finding that the District Court improperly made determinations of material fact when it discounted civilian witness testimony that they heard no warning given before a police officer released his police dog.); Massasoit v. Carter, 439 F. Supp. 2d 463, 478 (M.D.N.C. 2006) ("In the end, viewing all of the evidence in the light most favorable to plaintiffs, Phelps was in a place where he could have heard Tomeny yelling for him to kill or shoot Butler and he did not hear this. In instances such as this, the Court cannot simply ignore the fact that a witness did not hear something that they should have heard.").

This case is much like the case in Sledd v. Linsday, 102 F.3d 282 (7th Cir. 1996), where the Seventh Circuit found that several triable issues of material fact remained with respect to whether the

Plaintiff had suffered a Fourth Amendment violation. In Sledd, the court credited the testimony of the "neighbors in the adjacent duplexes" who "also heard no 'knock and announce' prior to the officers' forced entry into the house." Id. at 286. The court eventually found that:

> [h]ere, there are jury issues on several crucial questions. First, the parties dispute whether the officers announced their presence and warned Sledd that they were police executing a warrant. The police officers have not claimed any exigent circumstances to exempt their actions from the usual 'knock and announce' rule. Sledd introduced testimony from a number of persons that no warnings were given and that the officers were not otherwise identifiable as members of the police department.

Id. at 288. Likewise, in this case the Plaintiff has introduced testimony that none of the neighbors home on the morning of the incident heard the police knock and announce, and that at least three (3) of these neighbors believe that they were in a position to have heard any such knock or announcement had either occurred. The Defendant may be able to discredit this testimony using his expert's testimony, or otherwise. However, this factual determination is one for the jury and not for the Court. Accordingly, the Court finds that material fact issues remain as to whether the Kobayashi knocked and announced his presence, as constitutionally required, before entering the Whittier/Diotaiuto household, and therefore his

motion for summary judgment must be denied on these grounds.[10]

C. Plaintiffs have advanced insufficient evidence to create a material issue of fact as to whether Kobayashi authorized the device to be deployed blindly or directly at Diotaiuto.

Next, the Defendant argues that even if Bruna did throw the device blindly or intentionally throw it at Diotaiuto, [11]the Plaintiff has provided insufficient

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[10] The Defendant for the first time makes a half-hearted argument that exigent circumstances were present. However, at the operational plan the testimony of the officers was that a knock and announce was to be executed. None of the officers testified in their deposition that exigent circumstances were present, instead each officer testified that the knock and announce did in fact occur. The record shows that the lights had been out at the Whittier/Diotaiuto household and it had been quiet for an hour. There is no evidence in the record to suggest that exigent circumstances developed at the scene.

[11] As more fully discussed in the Court's Order Granting in Part and Denying in Part Defendant Sean Visners and Andre Bruna's Motion for Summary Judgment, the record further does not support any conclusion that Bruna deployed the flash-bang in an unconstitutional manner. As evidence that Bruna is lying concerning whether he looked prior to deploying the flash-bang device, the Plaintiff points to Officer Goldstein's testimony that he saw Diotaiuto in the living room shortly before Bruna threw the device and that Officer Visners also saw

evidence to create a material issue of fact showing that Kobayashi authorized the device to be deployed in this manner. The Court agrees. For claims, such as this, under § 1983, a supervisor cannot be held liable merely because a subordinate violates another's constitutional rights. Gonzales v. Reno, 325 F.3d 1228, 1234 (11th Cir. 2003). "Instead, supervisory liability under § 1983 occurs either when the supervisor personally participates in the alleged unconstitutional conduct or when there is a causal connection between the actions of a supervising official and the alleged constitutional deprivation."

Diotaiuto shortly after Bruna threw the device. The fact that these officers saw Diotaiuto and Bruna did not does not mean that Bruna did not look at the portion of the room where he was instructed to throw the flash-bang. The evidence advanced by the Plaintiff is entirely insufficient to raise a genuine issue of material fact. The record shows that Diotaiuto showed no signs of injury, whatsoever, from the distraction device, suggesting that the device did not detonate within any dangerous proximity to Diotaiuto. Plaintiff also points to the fact that there is no specific passage in the written materials indicating that officers should not throw a flash bang blindly or directly at a subject, however, both Defendants Bruna and Kobayashi testified that the training Bruna underwent taught him that under normal circumstances this was an improper manner in which to deploy the device. Despite the fact that there is no evidence that the distraction device was deployed in an unconstitutional manner, and therefore no vicarious liability, City of Los Angeles v. Heller, *475* U.S. 796, 799 (1986), the Court will in an abundance of caution evaluate Kobayashi's supervisory liability.

Cottone v. Jenne, 326 F.3d 1352, 1360 (11th Cir. 2003). A causal connection is established where: "1) a 'history of widespread abuse' puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he or she fails to do so; 2) a supervisor's custom or policy results in deliberate indifference to constitutional rights; or 3) facts support an inference that the supervisor directed subordinates to act unlawfully or knew that subordinate would act unlawfully and failed to stop them from doing so." Matthews v. Crosby, 480 F.3d 1265, 1270 (2007) (citing Cottone, 326 F.3d at 1360). As the Eleventh Circuit has pointed out, the standard for holding a supervisor liable for the conduct of his or her subordinate is "extremely rigorous." Cottone, 326 F.3d at 1360. Accordingly, as Defendant points out, even if the distraction device were improperly deployed in violation of the decedent's constitutional rights, the law would not impose liability on Kobayashi absent a showing that he sanctioned, authorized, or ordered the improper deployment.

The evidence in the record shows that Kobayashi provided instruction concerning the proper deployment of distraction devices, instructing officers that they should not throw them at people and that they must look before throwing them. Both Kobayashi and Bruna testified that these were the instructions given to Bruna. Further, such instructions were given to SWAT team members during their eighty (80) hours of SWAT training at mandatory SWAT school, along with the mandatory yearly minimum of 130 hours of continuing SWAT education. Plaintiff provides nothing other than pure

conjecture and speculation to support her claim that Kobayashi can be held liable for any non-existent constitutional violation committed by Bruna. Because the evidence in the record that Kobayashi properly instructed Bruna with respect to the proper detonation of the distraction device is uncontroverted and the Plaintiff advances no evidence to show that Kobayashi was on notice that Bruna would act contrary to his instructions,[12] the Defendant's motion for summary judgment on the grounds of supervisor liability must be granted.

D. Even if Bruna deployed the flash-bang device blindly or directly at Diotaiuto, Kobayashi is nonetheless entitled to qualified immunity.

Despite the fact that the Court has already held that the record does not support any conclusion that officer Bruna threw the flash bang device either blindly or directly at Diotaiuto, the Court will, in an

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[12] While a supervisor's knowledge of prior incidents in which constitutional rights were violated can put him or her on notice of the need to take action to prevent further problems, Gold v. City of Miami, 151 F.3d 1346, 1352 n. 12 (11th Cir. 1998), the absence of prior problems, which is the situation the Court is confronted with in this case, is evidence that the supervisor was not on notice of the need to correct a problem. See Mercado v. City of Orlando, 407 F.3d 1152, 1158 (11th Cir. 2005) (supervisor not liable for subordinate's improper discharge of a bean-bag launcher since there was no evidence of prior misuse, and the supervisor could not reasonably anticipate misuse).

abundance of caution, address Defendant Kobayashi's qualified immunity claim. Defendant Kobayashi argues alternatively that *even if* the facts claimed by the Plaintiff were true, he would nonetheless be entitled to qualified immunity.

Qualified immunity is an entitlement not to stand trial or face the burden of litigation, rather than a mere defense to liability. Gonzales v. Reno, 325 F.3d 1228, 1233 (11th Cir. 2003). Whether a public officer is entitled to qualified immunity depends on the specific details of a case, and is a question of law for the Court. Tapley v. Collins, 211 F.3d 1210, 1215 (11th Cir. 2000). "The purpose of this immunity is to allow governmental officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law." Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002)(internal citations omitted). Under the doctrine, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Evans v. Hightower, 117 F.3d 1318, 1320 (11th Cir. 1997) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

In addressing claims of qualified immunity, the Eleventh Circuit applies the following two-part analysis. "First the defendant government official must prove that he was acting within the scope of his

discretionary authority when the alleged wrongful act occurred. If the defendant meets this burden, the plaintiff must then demonstrate that the defendant violated clearly established law based upon objective standards." Evans, 117 F.3d at 1320 (internal citations omitted).

Under the first step of the analysis, as the Court found in its Order Denying the Defendants' Motion to Dismiss [DE 52], "[u]nder this standard, Defendant Kobayashi, as a matter of law, was undoubtedly engaged in a discretionary function when [he] participated in serving the search warrant." at p. 4. No party disputes this.

Considering the second part of the qualified immunity analysis, the plaintiff must then demonstrate that the Defendants violated "clearly established law based on objective standards." Evans, 117 F.3d at 1320 (citing Hartsfield v. Lemacks, 50 F.3d 950, 953 (11th Cir. 1995)). "In order to meet this burden, the plaintiff must demonstrate that the contours of his right were sufficiently clear so that reasonable officers would have understood that their actions violated his rights." Evans, 117 F.3d at 1320 (citing Swint v. City of Wadley, 51 F.3d 988, 995 (11th Cir. 1995) and Anderson v. Creighton, 483 U.S. 635, 640 (1987)). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . , but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Anderson, 483 U.S. at 640 (internal citations omitted); see also Moniz v. City of Fort Lauderdale,

145 F.3d 1278, 1282 (11th Cir. 1998).

The analysis of whether a "clearly established law" was violated also has two steps. Holmes v. Kucynda, 321 F.3d 1069, 1077 (11th Cir. 2003). First, is the "threshold question" of whether the facts as alleged, viewed in the light most favorable to the Plaintiff, would establish a constitutional violation. Id. (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). "If no constitutional violation is established, then the defendants prevail, and 'there is no necessity for further inquiries concerning qualified immunity." Id. (quoting Saucier, 533 U.S. at 201). However, if a constitutional right would have been violated under the plaintiffs version of the facts, the Court then must determine whether that right was clearly established. Id.

As the Defendant points out, courts have repeatedly upheld the use of distraction devices for high risk warrants so long as not deployed in a dangerous manner, around innocent bystanders, the elderly or small children. See e.g. United States v. Boulanger, 444 F.3d 76, 85 (1st Cir. 2006) (noting that "the police planned the search after determining that there were no children or elderly people in the apartment."); Molina v. Cooper, 325 F.3d 963, 973 (7th Cir. 2003) (considering the fact that the "flash bang devices were not used in the presence of Jackie or the children."); Wailer v. Citty of Danville, 212 Fed. Appx. 162, 166(4th Cir. 2006). These cases upholding the use of flash-bang devices include cases in the Eleventh Circuit. See e.g. United States v. Baker, 16 F.3d 854, 856 (11th Cir. 1994) (finding the

use of the distractionary device was appropriate where intelligence showed that the door was barricaded and two dobermans awaited inside). There is case law from other circuits holding that *under certain circumstances,* and despite the fact that a suspect was known to be armed or violent, the use of a flash bang device constitute a constitutional violation. However, those cases nearly all involve circumstances not present here; namely the presence of children, the elderly and innocent bystanders. See United States v. Jones, 214 F.3d 836, 838 (7th Cir. 2000) (finding in dicta that the use of the flash-bang device was unreasonable under the circumstances of the case because a 6-year-old child lived in the apartment); Boyd v. Benton County, 374 F.3d 773, 779 (9th Cir. 2004) (finding that the blind deployment of a flash bang device into a dwelling where multiple innocent bystanders were suspected to be present was unreasonable). At least one district court has held that it is unconstitutional to intentionally deploy a flash-bang device directly at a suspect. Taylor v. City of Middletown, 436 F. Supp. 2d 377, 378 (D. Conn. 2006). Accordingly, while the Court agrees that there are certain factual scenarios, not present here, where the deployment of a flash bang device could be unconstitutional, even under those sets of facts the Plaintiff has not cited to a single Eleventh Circuit case holding this use of a flash bang device to be unconstitutional. Belcher v. City of Atlanta, 30 F.3d 1390, 1400(11th Cir. 1994) (holding that non-binding authorities cannot settle the law in the Eleventh Circuit for purposes of qualified immunity). Accordingly, the Court finds that even under facts more favorable to the Plaintiff than those present

here, Defendant Kobayashi is nonetheless entitled to qualified immunity and his motion for summary judgment must be granted on these grounds.

E. Normal tort-law principles apply to damages flowing from any potential Fourth Amendment violation for failure to knock and announce.

Finally, Kobayashi argues that he cannot, as a matter of law, be held liable for the shooting death of Diotaiuto because he did not use deadly force against Diotaiuto. The Court thinks that Defendant's argument in this regard misses the point. As support for the proposition that he cannot be held liable for the death of Anthony Diotaiuto the Defendant cites to a string of cases holding that the "reasonableness of an officer's actions in creating the dangerous situation is not relevant to the Fourth Amendment [excessive force] analysis; rather reasonableness is determined based on the information possessed by the officer at the moment force is employed. Waterman v. Batton, 393 F.3d 471, 477 (4th Cir. 2005); see also Carter v. Buscher, 973 F.2d 1328, 1333 (7th Cir. 1992); Cole v. Bone, 993 F.2d 1328, 1333 (8th Cir. 1993). However, the failing in the Defendant's argument is that the Defendant is not charged with committing the constitutional violation of excessive force. Instead he is charged with the failure to knock and announce. The Plaintiff may claim as damages all of the results proximately caused by the Defendant's constitutional violation, if any. Jackson v. Sauls, 206 F.3d 1156, 1168 (11th Cir. 2000) ("Although § 1983 addresses only constitutional

torts, § 1983 defendants are, as in common law suits, responsible for the natural and foreseeable consequences of their actions."). "For damages to be proximately caused by a constitutional tort, a plaintiff must show that, except for that constitutional tort, such injuries and damages would not have occurred and further that such injuries and damages were the reasonably foreseeable consequences of the tortious acts or omissions in issue." Id. at 1168. Despite the fact that Kobayashi is not liable for "excessive force" applied to Diotaiuto, and nobody claims he is, he is liable for any reasonably foreseeable damages proximately caused by his prior constitutional violation.

III. CONCLUSION

Accordingly, for the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant Sergeant Daniel Kobayashi's Motion for Summary Judgment [DE 134] **GRANTED in part** and **DENIED in part;**

2. Summary Judgment is granted in favor of Defendant Kobayashi with respect to his supervisory liability claims in relation to the deployment of the flash-bang device;

3. Summary Judgment is denied with respect to all claims related to the failure to knock and announce.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 12th day of May, 2008.

/s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of record

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-12900-AA

FILED
U.S. Court of Appeals
Eleventh Circuit
November 13 2009
Thomas K. Kahn, Clerk

MARLENE WHITTIER,
as Personal Representative of the Estate
of Anthony Diotaiuto deceased and
individually, ANDREW DIOTAIUTO,
Plaintiffs-Appellees,

versus

CITY OF SUNRISE, a Municipality of
the State of Florida, et al.,
Defendants,
ANDRE BRUNA, individually,
SEAN VISNERS, individually,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: EDMONDSON, BLACK and SILER,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

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* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit Judge, sitting by designation.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-12836-AA

FILED
U.S. Court of Appeals
Eleventh Circuit
Nov 09 2009
Thomas K. Kahn, Clerk

MARLENE WHITTIER,
as Personal Representative of the Estate
of Anthony Diotaiuto deceased and
individually, ANDREW DIOTAIUTO,
Plaintiffs-Appellees,

versus

CITY OF SUNRISE, a Municipality of
the State of Florida, et al.,
Defendants,
ERIC GOLDSTEIN, individually,
ERIK PALACIO, individually,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: EDMONDSON, BLACK and SILER,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

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* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit Judge, sitting by designation.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-12998-AA

FILED
U.S. Court of Appeals
Eleventh Circuit
Nov 09 2009
Thomas K. Kahn, Clerk

MARLENE WHITTIER,
as Personal Representative of the Estate
of Anthony Diotaiuto deceased and
individually, ANDREW DIOTAIUTO,
Plaintiffs-Appellees,

versus

CITY OF SUNRISE, a Municipality of
the State of Florida, et al.,
Defendants,
DANIEL KOBAYASHI, individually,
Defendants-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: EDMONDSON, BLACK and SILER,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

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* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit Judge, sitting by designation.